FEB 10 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October 1955 Term

No. 680

ARMAND VALDEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which confirmed his conviction for a violation of Sections 173 and 174, Title 21, United States Code.

(a) The Opinion Below

The opinion of the Court below has not yet been officially reported. A copy is hereto annexed as an appendix.

(b) Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on January 13, 1956.

2. No application for rehearing was made.

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. C. Rule 37; and 28 U. S. C. Section 1254.

(c) Questions Presented for Review

1. Can a conviction for the sale of narcotics be sustained where the defendant acted as a procuring agent for a government agent who requested him to obtain narcotics for her?

2. Did the Government make out a case for submission to the jury where a Government witness herself testified that she advanced the sum of $50.00 to the defendant in order to get narcotics for her and no proof was adduced that the defendant sold those narcotics at a profit?

3. Was the entrapment admittedly practiced by the Government illegal by reason of the fact that the defendant had never been involved in the sale of narcotics, and that there was no probable cause to assume that the defendant had ever been involved in the sale of narcotics?

4. Did the Trial Court abuse its discretion and commit prejudicial error in refusing to issue a writ of habeas corpus *ad testificandum* in order to have produced, as a witness, a Federal prisoner who had acted as an informer for the Government?

(d) Statutes and Rules Involved

TITLE 21, SECTION 173, U. S. CODE

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* —It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, § 2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38

Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, § 3, 46 Stat. 586.)

TITLE 21, SECTION 174, U. S. CODE

174. *Same; penalty; evidence.*—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by

the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§ 1, 5 (1), 65 Stat. 767.)

TITLE 18 UNITED STATES CODE, RULE 17(b) FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 17. Subpoena

(b) INDIGENT DEFENDANTS. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant

cannot safely go to trial without the witness and that the defendant does not have sufficient means and is factually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(e) Statement of the Case

Petitioner was indicted for a violation of Title 21, Sections 173 and 174, U. S. Code. After trial he was found guilty by a verdict of a jury and was sentenced as a second offender to eight years' imprisonment and a remitted fine of $1.00.

At the opening of the trial the prosecution characterized the nature of the crime with which the petitioner was charged as follows:

> "In substance, the grand jury charged that on April 9, 1952 the defendant sold a narcotic drug, heroin, and sold approximately 50 grains of this drug and he received, naturally, some money for it."
>
> * * *
>
> "This is an important case to the defendant. Obviously, his freedom is at stake. It is an important case to the Government for many reasons, primarily because it is a case which involves the sale of a narcotic drug."

It appeared clearly from said statement that the prosecution proceeded upon the theory that petitioner was on trial solely for the *sale* of narcotics and not for any other other crime referred to in Sections 173 and 174 of Title 21, U. S. Code.

The evidence adduced by the Government in substance showed that Miss Thomas, a policewoman who had been assigned to the Narcotics Squad in an undercover capacity, had an appointment to meet somebody on April 9, 1952, at five P. M., for the purpose of buying a quantity of narcotics and that at that time a convicted narcotic peddler who was acting as an informer for the Government was with her; that she, together with said informer, whom she knew as Bill, and the defendant took a taxi to the vicinity of 100th Street and Lexington Avenue and that before they left the cab she gave the defendant $50.00 and asked him to buy one-quarter of an ounce of heroin; that they got out of the taxi-cab and she and Bill waited while the defendant left and thereafter he joined them at 116th Street and Park Avenue; that all three then proceeded together to 116th Street, where they took another taxi-cab to 2040 Seventh Avenue; that there they all entered an apartment where the defendant emptied the contents of a glassine package and divided the whitish powder and delivered to Miss Thomas, in a glassine package, what was claimed to be 45.5 grains of heroin.

The defendant took the witness stand and denied that he had ever sold narcotics to anyone, although he admitted that he was a drug addict and on several occasions had pleaded guilty to the possession of drugs. In connection with the events of April 9, 1952, the defendant testified that he had met Miss Thomas in his house and that at that time Bill, who was a friend of his, was with Miss Thomas and introduced her as his girl friend to him. Although the defendant changed his testimony in some respects, he categorically denied that he ever received $50.00 from Miss Thomas and that he went into a taxi-cab for that purpose with her and that Miss Thomas had ever asked him to get narcotics.

A motion for a directed verdict was denied by the Trial Court.

(f) Jurisdiction of the Courts Below

The District Court had jurisdiction under 21 U. S. Code, Sections 173 and 174. The Court of Appeals had jurisdiction under 28 U. S. Code, Section 1291.

(g) Reasons for Allowance of the Writ

As to Questions 1 and 2.

The Court below has rendered a decision in conflict with the decisions of other courts of appeal relating to the distinction between a "seller" of narcotics and a "procuring agent," which is an important question of federal law which has not been, but should be, settled by this Court.

The writer has been unable to find any case which takes the position adopted by the Court of Appeals in the instant case that a conviction for the sale of narcotics may be upheld where the defendant did not sell any narcotics at a profit but obtained said narcotics for an undercover agent for the Government, at her request.

The decisions in *United States* v. *Sawyer* (3rd Cir.) (1954), 210 F. (2d) 169, and *Adams* v. *United States* (5th Cir.) (1955), 220 F. (2d) 297, hold that where a defendant obtains narcotics at the request of a government agent, and makes no profit on the transaction, the defendant is merely a purchasing agent and cannot be convicted of selling narcotics.

The opinion of Judge Medina in the instant case states that the facts of those two cases bear little resemblance to the facts of the instant case and that, therefore, the Court below had no occasion to take any position with reference to the holdings in those cases. Judge Medina did not say in what respect the facts are diffierent. The writer

respectfully submits that the material facts in both cases are the same.

In the *Adams* case, cited *supra,* as in the instant case, the defendant had received the sum of $50.00 from a government agent in order to obtain heroin. He did so and delivered it to the government agent. As in the instant case, no proof was adduced in the *Adams* case, cited *supra,* that the defendant made a profit in connection with the transaction or that he was associated in selling with the person from whom the said heroin was purchased.

Upon those facts the Court in the *Adams* case directed a verdict of acquittal under the theory laid down in the *Sawyer* case, cited *supra.* While in the *Sawyer* case the evidence was conflicting as to whether the defendant acted as a seller or as a procuring agent, and there was, therefore, a question for the jury, the Court in the *Adams* case properly pointed out that the Trial Court should have directed a verdict of acquittal since all of the evidence was quite consistent with the defendant's acting as a purchasing agent instead of as a seller.

So in the instant case, no testimony was adduced by the Government that the defendant acted as a seller and no testimony was adduced that he profited in any way from the transaction or that he was associated in selling with the person from whom the said heroin was purchased. The Trial Court should therefore have directed a verdict of acquittal.

Judge Medina, at page 3 of his opinion, cites the following testimony of Miss Thomas, to wit:

> "The Court: Did Valdes say he was going to buy it?
>
> The Witness: He said he was going to get it."

and states that in view of said testimony it is difficult to understand the contention of counsel that defendant's motion for a direction of a verdict of acquittal should have been granted. Said holding, however, is directly opposed to the holding of the *Adams* case and it is significant to note that in the *Adams* case, as well as in the *Sawyer* case, the Courts used the words "obtaining" or "getting" of heroin for the government agent in order to describe the transfer as that of a procuring agent.

It appears from the foregoing that the decision of the Court below is in direct conflict with the theory laid down in the *Adams* and *Sawyer* cases and with the precise holding in the *Adams* case.

Assuming, without conceding, however, that there was evidence from which a sale by the defendant to Miss Thomas could have been spelt out beyond a reasonable doubt, then the Trial Court should at least have pointed out to the jury that if they found that the federal agent asked the defendant to get some heroin for her and thereupon the defendant undertook to act in the agent's behalf rather than his own, and in so doing, purchased the drugs from a third party with whom he was not associated, without any profit to him, and thereafter delivered it to the government agent, the defendant would not be a seller and could not be convicted. Said instructions would at least have been in accordance with the ruling in the *Sawyer* case.

Although the Court below is not very definite on this point, it seems to be of the opinion that the defendant could not only have been convicted for selling, but also for any of the other crimes referred to in Sections 173 and 174 of Title 21. However, it appears clearly from the opening statement made by the Assistant United States Attorney, as quoted under the statement of this case, that the defendant was only tried for the *sale* of narcotics and for nothing else.

It is interesting to note that the case of *Adams* v. *United States* was called to the attention of the Court below in the brief submitted by the Government. In that brief the Government stated the following:

> "The appellant contends that the Government's evidence was insufficient to prove that the appellant was a seller of narcotics but only indicates that he was a 'procuring agent' for Miss Thomas. The appellant cites *United States* v. *Sawyer,* 210 F. 2d 169 (3rd Cir. 1954) in support of his position. The government calls the Court's attention to *Adams* v. *United States,* 220 F. 2d 297 (5th Cir. 1955), a more recent case employing the 'procuring agent' theory, which for the first time, was enunciated in the *Sawyer* case. Even though the government disagrees with both of these cases, and does not believe they represent the law in this Circuit, they are in any event distinguishable from the case before the Court."

Since the Government properly stated that the law laid down in the *Sawyer* and *Adams* cases is not the law in the Second Circuit, it is of importance that said precise point be reviewed and settled by this Honorable Court so that there may be uniform application of the law among the Federal Courts.

That the Court below, in accordance with the contention of the Government, endeavored to distinguish those two cases from the instant case, shows only that the Court below erred in interpreting those cases. As heretofore stated, a comparison of the facts in the instant case with the facts in the *Adams* case shows that those facts are almost identical.

It has been shown that the Government clearly elected to try the petitioner on the charge of selling narcotics.

However, if there is any doubt that petitioner was convicted for the sale of narcotics and not for the recepit, possession or concealment of narcotics, the sentence of eight years, which was imposed upon petitioner by the Court must dispel such doubt. This Court can take judicial notice of the fact that a mere "user" of narcotics does not receive such a stringent sentence and that it is the policy of the courts to attempt to rehabilitate such persons and not to confine them to prison for an excessive period of time. Therefore the conclusion is inescapable that petitioner was tried and sentenced for the sale of narcotics, of which crime he was clearly not guilty even accepting the Government's evidence in the most favorable light.

As to Question 3.

The rules governing the defense of entrapment in the Federal Courts have been authoritatively laid down by the Supreme Court of the United States in the case of *Sorrells* v. *United States,* 287 U. S. 435, 53 Sup. Ct. 210. The cases following said rule are legion and among them are:

Heath v. *United States,* 169 F. (2d) 1007;
Price v. *United States,* 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727;
Grimm v. *United States,* 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550;
Goode v. *United States,* 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297;
Andrews v. *United States,* 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023.

It appears from the ruling in the *Sorrells* case, *supra,* that the Supreme Court of the United States has defined two separate classes of entrapment, the second of which was held to be a good defense in the Federal Courts. Since it is uncontested that the Government entrapped petitioner, the only question is whether such entrapment comes with-

in the first or second class, as defined by the Supreme Court of the United States. It is the contention of the writer that an analysis of those two types of entrapment, taken together with the facts in the instant case, does not leave the slightest doubt that the means employed by the Government in the instant case clearly come within the second type of entrapment, so strongly condemned by the Supreme Court of the United States.

The Supreme Court has held that an entrapment is only permissible if the person to be caught is actually engaged in criminal enterprises and that only then the Government may employ artifice and stratagem to catch said criminal. However, the Supreme Court held that it is not the duty of the Government officers to incite and create crime for the purpose of prosecuting and punishing it and to induce its commission in order that they may prosecute.

The instant case shows clearly that the facts come within the said second class of entrapment which is held to be a good defense. The witnesses for the Government all testified that they did not know petitioner prior to the entrapment on April 9, 1952; that they even did not know his name; that they did not have any knowledge of any criminal activities of petitioner in selling narcotics or otherwise; and that they even did not know that petitioner was a user of narcotics, a fact conceded by him. The evidence adduced by the Government was clear to the effect that the only purpose of paying $50 to petitioner was to make a purchase of evidence and to catch him. The evidence in the instant case strongly tends to prove, as in the *Sorrells* case, *supra*, that the officers' first and chief endeavor was to create crime in order to punish it.

In other words, the Government did not have any evidence that petitioner was engaged in the criminal activity of selling narcotics and could not have had any evidence to

that effect since petitioner had never engaged in such activities. All the Government agents were interested in was to make a purchase of evidence from a person to whom a policewoman was to be introduced by a special employee. Neither the policewoman nor the Federal Agents knew who this person was but used a convicted criminal as a special agent to catch a person to be prosecuted for the sale of narcotics who was entirely unknown to them up to that time.

It appears from the foregoing that the Government, by using said criminal in order to catch petitioner, employed artifice and stratagem to catch a person for the purpose of prosecuting him—a method so severely condemned by the Supreme Court of the United States.

It also appears from the foregoing that the Government did not have the slightest knowledge of any criminal activities of petitioner and even did not know that he was a user of narcotics. Petitioner, on direct examination, freely admitted that he had, on two occasions, pleaded guilty to the possession of drugs. Assuming that the Government agents, prior to April 9, 1952, had known that petitioner was a *user* of drugs and that he had pleaded guilty to the possession of drugs, they still would not have been justified, under the *Sorrells* case, *supra*, in entrapping him into the purchase of narcotics, thereby placing themselves in a position to prosecute him for selling narcotics.

It is most respectfully submitted that using drugs and selling drugs are entirely different and should be treated entirely differently. It is at present well recognized that a narcotic addict is to be pitied and helped and is the subject of needed medical treatment rather than of criminal prosecution. The seller of narcotics, however, is abhorred, and rightfully so, and should be the subject of criminal prosecution.

The Court below, however, was of the opinion that the Government was entitled to entrap petitioner since he was previously convicted for *possession* of drugs. This Honorable Court is urged to recognize the distinction between a user and a seller of drugs and should not encourage the entrapment of addicts which causes them to be labelled as sellers.

It appears from the foregoing that the Trial Judge should have directed a verdict of acquittal since it appears clearly from the Government's case that petitioner was unlawfully entrapped. At least the Trial Court should have charged the jury as requested by counsel for petitioner. All of the requests were worded in the precise language of *Sorrells* v. *United States, supra,* but the Trial Judge declined to charge in the language submitted by counsel for petitioner.

As to Question 4.

Rule 17 (b) of the Federal Rules of Criminal Procedure provides that the Court may, at any time, issue a subpoena upon the request of an indigent defendant and that the costs incurred by said process should be borne by the Government. This rule is in accordance with the compulsory process clause of the Constitution of the United States and is so very clearly worded as to leave no room for doubt.

That petitioner was entitled to the issuance of a writ of habeas corpus *ad testificandum* was clearly recognized by the Trial Judge who stated as follows:

> "I have advised Mr. Palmer that I will issue a writ of habeas corpus requiring him to be produced from the penitentiary in Michigan where he now is, in this court to give testimony, and Mr. Palmer can put him on the stand.

> "The only question remaining is as to who is to pay the expenses for bringing him. If Mr. Palmer is calling him, Mr. Palmer has to pay the expenses—or Mr. Palmer's client has to pay the expenses for bringing him here, unless Mr. Palmer can persuade me by written affidavit that his client is indigent within the rules of the court in which case the Government might have to bear the expense."

In other words, the Trial Judge was ready to sign a writ of habeas corpus based upon a petition submitted to him. The only question left open by the Trial Judge at that time was the question whether the expenses should be borne by the Government or by petitioner. In this connection the Trial Judge clearly stated that the Government would have to bear the expenses if an affidavit of indigency, pursuant to Rule 17 (b), would be submitted by petitioner. After the affidavit of indigency was submitted by him and said affidavit showed that petitioner was without any means the Trial Judge suddenly reversed his decision and refused to sign the writ of habeas corpus, stating that he did not see any necessity for it since the testimony of the informer, in the opinion of the Court, would be completely irrelevant. Said refusal, it is respectfully submitted, was clearly erroneous on the part of the Trial Judge.

It appears clearly from Rule 17 of the Federal Rules of Criminal Procedure that every defendant has an absolute right to compulsory process and that said compulsory process should be issued at the expense of the Government if an affidavit of indigency is submitted by the defendant. The materiality of the witness to be subpoenaed is not to be passed upon by the Trial Judge. There is no authority whatsoever for the ruling of the Trial Court that the Court may refuse the issuance of a writ of habeas corpus *ad testi-*

ficandum if it feels that the testimony of the person to be subpoenaed is immaterial.

The Court below, apparently recognizing that the refusal of the Trial Court to issue said writ of habeas corpus, upon the ground that the testimony of Bill, the Government informer, was immaterial, was erroneous, endeavors to justify said ruling upon the ground that the application for said writ was unduly delayed. However, the record clearly shows that the application was made on the very first day of the taking of testimony, to wit, on January 7, 1955, and that the Government would have had ample time to bring in said witness since the trial lasted until January 12, 1955.

It appears from the foregoing that the Trial Judge had assured counsel for petitioner that he would issue a writ of habeas corpus as soon as an affidavit of indigency was submitted, and since said affidavit admittedly was submitted, the Court abused its discretion in refusing to issue such writ.

CONCLUSION

It is respectfully submitted that the various questions raised are of such importance in the administration of the criminal law, and particularly the law relating to narcotics, that there should be an authoritative determination of the same by this Court. Accordingly, petitioner asks that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER,
Counsel for Petitioner.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 184—October Term, 1955.

(Argued December 19, 1955 Decided January 13, 1956.)

Docket No. 23684

—o—

UNITED STATES OF AMERICA,
Appellee,

—against—

ARMAND VALDEZ,
Appellant.

—o—

Before:

CLARK, *Chief Judge,* and
MEDINA and WATERMAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York. Archie O. Dawson, *Judge.*

Defendant appeals from a judgment of conviction for violation of 21 U. S. C. Sections 173, 174. Affirmed.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (David Jaffe, Assistant U. S. Atty., New York City, of Counsel), *for Appellee.*

ARCHIBALD PALMER, New York City, *for Appellant.*

MEDINA, *Circuit Judge*:

Defendant appeals from a judgment, entered upon the verdict of a jury, by which he was found guilty of "receiving, selling or facilitating the transportation" of a quantity of heroin. As a second offender he was sentenced to eight years imprisonment and a remitted fine of one dollar.

Shown by the records of the Federal Bureau of Narcotics "to have been in the narcotics traffic at least 10 years," the government agents proceeded to get the necessary evidence for another conviction through the instrumentality of a man named "Bill" who knew defendant "because he had purchased drugs from him."

The federal officers worked in cooperation with members of the Narcotics Squad of the New York police force. "Bill" made an appointment with the defendant whom he was to meet on the afternoon of April 9, 1952, in the neighborhood of 116th Street and Lexington Avenue, in New York City. Mabel Thomas, a New York policewoman, with three years experience in this type of work, was assigned to meet "Bill" and buy the narcotics from defendant. In her preliminary conversation with "Bill" she was told that they were going to meet the defendant, that "he was the person I was supposed to make the buy from," that "Bill" would introduce her as "the one he had told him about," and that, if the defendant pressed her for an explanation of why she wanted narcotics, she was to say that "it was because I was interested in selling it."

Miss Thomas testified that defendant "was a little while in arriving but when he did show up" the three of them got in a taxicab, where the following conversation ensued between Miss Thomas and defendant. "I asked to buy a quarter of an ounce of heroin * * * I told him I wanted something good * * * I asked him how much it would be and he said fifty * * * he said to give it to him there because I couldn't go any further * * * I gave him the money

* * * he suggested that we wait for him on the corner of Park Avenue and 116th Street."

They got out of the taxicab, the defendant walked away hurriedly, and in about twenty minutes returned. The three proceeded to Madison Avenue and 116th Street where they took another taxicab to 2040 Seventh Avenue, went upstairs, were ushered into an apartment by the use of a key the defendant had in his pocket. There defendant produced a quantity of white powder which defendant divided up with a knife, delivering to Miss Thomas in a glassine bag what proved to be 45.5 grains of heroin. With respect to the conversation as defendant left the first taxicab, the following colloquy between Miss Thomas and the Court is significant.

> "The Court: Did Valdes say he was going to buy it?
>
> The Witness: He said he was going to get it."

In view of this explicit and circumstantial account of what occurred it is difficult to understand the contention of counsel that defendant's motion for the direction of a verdict of acquittal should have been granted. The evidence far exceeds the minimum necessary to warrant the submission to the jury of the question of the guilt or innocence of defendant.

Much is made of the so-called issue of entrapment. But defendant testified at great length and, even taking into account the various contradictory versions of what he claimed occurred, the essence of his testimony from first to last was that he was wholly innocent of the charge made against him. He admitted, however, that in 1949 he had been convicted "for possession of drugs," for which he served a prison term, that there was another similar conviction in 1946, and that he was an addict. There were additional convictions for possession of a pistol and for unlawfully transporting a woman for immoral purposes.

His familiarity with the traffic in narcotics is all too apparent throughout his testimony.

And yet, despite all this, we are solemnly assured that this is a case where, in the language so often quoted from *Sorrells* v. *United States,* 287 U. S. 435, 442, "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

Suffice it to say that the trial judge left the question of entrapment to the jury in a charge wholly free from error. If anything his elaboration of the subject was so extensive as to go far beyond anything justified by the record of defendant's demonstrated proclivities in the field of narcotics. Moreover, there was no occasion to read to the jury the variety of quotations from the opinions of appellate courts on the subject of entrapment, which were separately set forth in a number of requests to charge.

Although the identity of "Bill" was known to defendant's counsel some time before the trial, an application was made, after the testimony of Miss Thomas, for the issuance of a writ of habeas corpus ad testificandum to bring "Bill" at government expense from a federal penitentiary to testify on defendant's behalf. This application was supported by some proof of the indigence of defendant. But we can find no basis for holding that the denial of this writ constituted an abuse of judicial discretion. The application was unduly delayed, and the likelihood that the witness, if produced, would have in any substantial way aided the defense must have seemed remote.

In accord with the allegations of the indictment and the terms of the statute (21 U. S. C. Sections 173, 174), the trial judge properly instructed the jury that if the evidence established to their satisfaction beyond a reasonable doubt that defendant concealed, sold or facilitated the transportation, concealment or sale of narcotics defendant was

guilty, and that possession alone was "sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." But, even if only a sale had been charged, the evidence was amply sufficient to support a finding that there was a sale of 45.5 grains of heroin by defendant to Miss Thomas.

Appellant's reliance on the theory that defendant was merely a "procuring agent" is misplaced, as it was the testimony of Miss Thomas that she met defendant for the purpose of purchasing a quantity of heroin from him and that she did so. We have no occasion to take any position with reference to the holdings by our brethren of the Third and Fifth Circuits in *United States* v. *Sawyer,* 3 Cir., 1954, 210 F. 2d 169 and *Adams* v. *United States,* 5 Cir., 1955, 220 F. 2d 297, where the facts bear little resemblance to those before us here.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 680

ARMAND VALDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19-23; R. 68-72) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 13, 1956 (R. 73). The petition for a writ of certiorari was filed on February 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction on the charge of receiving, concealing, selling, and facilitating the transportation, concealment, and sale of narcotics.

2. Whether the evidence supports the verdict that petitioner was not entrapped.

3. Whether refusal of the court to grant a subpoena under Rule 17(b), F. R. Crim. P., for the production of an imprisoned witness constituted an abuse of discretion, where his testimony would not have added materially to the evidence in the case.

STATUTES AND RULE INVOLVED

The statutes provide in pertinent part:

21 U.S.C. 173:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin.
> * * *

21 U.S.C. 174:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Rule 17(b), F. R. Crim. P., provides in part:

> *Indigent Defendants.* The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall

be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of New York of receiving, concealing and selling narcotics on April 9, 1952 (R. 4-5). The government filed a second offender information which charged petitioner with a federal narcotics violation in 1946 (R. 2) and he was sentenced to a term of imprisonment for eight years and to a remitted fine of $1 (R. 5). On appeal, the judgment of conviction was affirmed (R. 73).

The evidence adduced at the trial may be summarized as follows:

On April 9, 1952, in the city of New York, pursuant to an arranged appointment, a federal

narcotics agent (Miss Mabel Thomas) together with special government employee Bill (William Jernigan (R. 32)) met petitioner, from whom Bill had previously purchased narcotics, for the purpose of buying narcotics from him (R. 18-19, 25). The three got into a taxi where Miss Thomas advised petitioner that she wished to buy a quarter of an ounce of heroin and asked the price. Petitioner said that the heroin would cost about fifty dollars and said he wanted the money before he could go any further. Miss Thomas gave him fifty dollars at that time (R. 19-21). At Lexington Avenue and 116th Street, the three left the taxi (R. 21). Petitioner advised Miss Thomas and Bill to wait for him at Park Avenue and 116th Street, and then left. Within a few minutes petitioner rejoined them and the three went by taxi to petitioner's apartment (R. 21-22). There petitioner said that it was necessary for him to divide the purchase since he had purchased more than Miss Thomas requested. He divided the contents of a package into two parts and gave one part to Miss Thomas. Miss Thomas took her part, rejoined surveilling narcotics agents, and gave them the package (R. 22-24). Upon analysis the package was found to contain heroin (R. 31).

Petitioner testified that Bill came to his apartment on April 9, 1952, and introduced Miss Thomas as his girl friend. Miss Thomas sat in the living room while petitioner and Bill went into the bedroom where Bill suggested that they obtain some drugs since he had some money. They took a cab

but nothing was said in the cab about the drug. At 116th and Lexington, they left the cab and petitioner and Bill crossed the street where a peddler approached them and sold the drugs to Bill. Returning to petitioner's apartment, Bill divided the drug in the bedroom with petitioner. Nothing was said or done in Miss Thomas' presence to advise her of the drug purchase (R. 32-35). Subsequently, petitioner testified that when Bill and his girl friend came to visit him on April 9, nothing was said about any drug purchase, that petitioner just went out with them and gave Bill $6 when he asked for money. During the outdoor excursion, Bill went into a drugstore alone for "cigarettes", and when the three returned to petitioner's apartment Bill left him "some" in a package "for a few sniffs", but it did not taste like heroin (R. 46-49).

Evidence was introduced to show that the Bureau of Narcotics received information to the effect that petitioner had been dealing in narcotics for several years, that he secured narcotics from an "Italian" at 117th and Lexington, and distributed them through a girl at the Lennox Lounge Bar (Def. Ex. J.; R. 63-67). Petitioner testified that he was a drug addict (R. 35) and that he had previously been convicted for unlawful possession of a pistol, unlawful purchase of cocaine, unlawful possession of heroin, and unlawful transportation of a woman (R. 36-38).

In his final instructions to the jury, the court gave a full charge on entrapment (R. 12-13). Dur-

ing deliberation the jury requested clarification of "the law and definition of entrapment." The judge further advised the jury (R. 57-59):

> Entrapment has been offered as a defense in this case. Entrapment exists only when the Government agents induce and originate the criminal intent of the defendant. There is none where the criminal intent is already present, and the agents merely afford the opportunity for the commission of a crime. That is the definition of entrapment.
>
> Now, as I pointed out in my charge, the United States Supreme Court, which has passed upon this subject, has said:
>
> > It is well settled that the fact that officers or employees of the Government merely afford the opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises.
>
> Therefore, if agents of the Government ask somebody to sell them narcotics, that alone is not entrapment. Entrapment would exist when the agents of the Government implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.
>
> Now that is two types of things, and as the courts have said, in determining whether

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this is entrapment or not, you may consider any evidence, such as evidence of past similar offenses of the defendant, or his ready complacence, or proof of his knowledge of and connection with the purchase, possession or sale of narcotics.

In other words, to put it colloquially, if the Government went out to someone they had no knowledge had anything to do with the possession, sale or transportation of narcotics, and persuaded him and induced him to make a sale, that might be entrapment.

On the other hand, if the evidence is such that you reasonably can conclude that the Government had reason to believe that this man was engaged in the narcotic traffic, and the Government agents went to him directly, or to somebody else, and said, "Here is somebody who wants to buy some narcotics", there they were furnishing the opportunity for him to commit a crime, but that is not entrapment.

Now that is the distinction between entrapment as a defense and entrapment which would not be any defense.

As the jury well knows, in many criminal cases it is necessary for the Government to employ artifice and stratagem, as the Supreme Court said, in order to discover whether people are committing a crime or not The employment of an artifice or a stratagem is not entrapment. In this case if you believe that the officers or employees of the Government

merely afforded an opportunity or facility for the commission of the offense, the defense of entrapment is not a good one.

However, if in this case the Government agents induced an otherwise innocent man to commit an offense, then the defense would be a good one, and this is an issue which you will have to take into consideration in reaching your verdict.

ARGUMENT

1. Seeking further review of the concurrent findings of both courts below, petitioner attacks (Pet. 8-15) the sufficiency of the evidence to support the verdict. He argues that the evidence showed that he was merely a "procuring agent" within the decisions in *United States* v. *Sawyer,* 210 F. 2d 169 (C.A. 3), and *Adams* v. *United States,* 220 F. 2d 297 (C.A. 5) (see also *United States* v. *Moses,* 220 F. 2d 166 (C.A. 3)), and not a seller as allegedly charged in the indictment.

As the court below ruled (Pet. 23), those cases, whatever their validity, have no application to the facts here involved. There, a special government employee used the defendant—moved by pity or sympathy for a purported fellow-addict—to buy narcotics from another at no profit to the defendant and without collaboration with the true seller. In this case, Miss Thomas testified that she simply "asked to buy a quarter of an ounce of heroin" and that petitioner fixed the price (R. 21). The fact that he had his own source of supply and that he obtained more narcotics than he turned

over to Miss Thomas does not alter the fact that petitioner's relationship to Miss Thomas was that of a seller. Moreover, the "procuring agent" theory applies, if at all, only where, as in *Sawyer* and *Adams, supra,* the defendants are charged solely with "selling" narcotics. Here, the indictment charged petitioner with receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics. Any one of these acts is a violation under Section 174 of Title 21 (*supra,* p. 3) for which the jury could have found petitioner guilty. *Martinez* v. *United States,* 220 F. 2d 740 (C.A. 1); *Parmagini* v. *United States,* 42 F. 2d 721 (C.A. 9), certiorari *denied,* 283 U.S. 818.

2. There is likewise no merit in petitioner's contention (Pet. 12-15) that the evidence establishes, as a matter of law, that he was entrapped. The government showed that it had reason to suspect that petitioner was a seller of narcotics, and Miss Thomas' testimony that her request to purchase was met with immediate acquiescence shows that there was no inciting to crime by the government. As shown in our Statement, *supra,* pp. 6-9, the issue was properly submitted to the jury on a thorough, correct charge, in accordance with the rule of *Sorrells* v. *United States,* 287 U.S. 435.

3. During the presentation of the government's case, petitioner's counsel for the first time[1] re-

[1] Government counsel had advised defense counsel eight months prior to trial that he did not believe he would use Bill as a witness and that Bill was incarcerated in a federal penitentiary at Milan, Michigan (R. 53-55).

quested the production at government expense under Rule 17(b), F. R. Crim. P., of William Jernigan (Bill), who was incarcerated at the federal penitentiary at Milan, Michigan (R. 26). The court denied the request on the ground "that the evidence that Jernigan can add on this will be so immaterial, that no matter who pays for it, there should be no occasion for delaying the trial" (R. 43-44). It felt that the only issue involved in the case, since petitioner's possession was undisputed, was his explanation thereof to which Jernigan could add little (R. 39-40, 44). The court did not deem it necessary to go into the question of whether petitioner was indigent, but indicated that there was sufficient evidence that petitioner was not indigent (R. 45).

Petitioner contends (Pet. 15-17) that the denial of his request was error in that "every defendant has an absolute right to compulsory process and that said compulsory process should be issued at the expense of the Government if an affidavit of indigency is submitted by the defendant." Rule 17(b) does not so provide. It authorizes the summoning of witnesses at government expense on an affidavit showing that "the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness", as well as averments of indigency.

The right to summon witnesses at the government's expense is discretionary with the trial court. Petitioner has not shown any abuse of discretion here, particularly since he waited until the trial

had started to make his request. *Goldsby* v. *United States,* 160 U.S. 70; *Gibson* v. *United States,* 53 F. 2d 721 (C.A. 8), certiorari denied, 285 U.S. 557; *Austin* v. *United States,* 19 F. 2d 127 (C.A. 9), certiorari denied, 275 U.S. 523.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1956.

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